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Supreme Court, U.S.
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No. 99-___

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the Madera Irrigation District was a party to the proceedings below.

Petitioner Central Green Company is a limited partnership with no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Central Green Company respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The lower courts held that Respondent United States is immune from this suit pursuant to the Flood Control Act of 1928, 33 U.S.C. 702c. The district court's opinion dismissing the complaint as to Respondent is reprinted in the appendix ("App.") at 10a-20a. The court of appeals' opinion (per Trott, J., joined by Hug, C.J., and Fletcher, J.) affirming is reported at 177 F.3d 834 and reprinted in the appendix at 1a-9a. The court of appeals' order denying rehearing and rehearing en banc is reprinted in the appendix at 21a.

JURISDICTION

Because the court of appeals entered its order denying rehearing and rehearing en banc no more than ninety days ago on September 7, 1999, this Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The immunity provision of the Flood Control Act of 1928, 33 U.S.C. 702c, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

STATEMENT OF THE CASE

This Petition presents the question whether the Flood Control Act of 1928 ("the Act") immunizes the United States from liability for damage caused by waters that were not carried in a federal flood control project to control floods. Petitioner's farm was damaged by *irrigation* waters carried in an *irrigation* canal. This case, accordingly, has nothing at all to

do with floods or flood waters for purposes of the Act. The panel below nonetheless reluctantly held that, under settled Ninth Circuit precedent, Respondent is immune from liability because the canal is nominally part of a massive federal public works project that has, as one of many authorized purposes, "flood control."

The panel took pains to emphasize that Respondent would *not* have been entitled to immunity in several other circuits, to express serious doubts about whether its decision was correct under this Court's precedents, and to invite this Court to grant certiorari to review its decision. App. 5a, 7a, 9a. Numerous other decisions of the courts of appeals have acknowledged that the circuits' conflicting tests for finding immunity are outcome determinative. *See infra* at 13-17. In an opinion respecting the denial of certiorari in a related case in 1992, Justice Stevens similarly drew attention to the "recurring conflict among the courts of appeals" on this issue, which has "assumed greater and greater importance," and urged Congress to resolve it. *Hiersche* v. *United States*, 503 U.S. 923, 923. But in the seven years since *Hiersche* it has become plain that only this Court can resolve the conflict: Congress has not amended the statute to resolve the substantial uncertainty over the scope of the government's immunity and still shows absolutely no interest in doing so; nor has Respondent, which is the only entity in a position to prod Congress into action, apparently urged any clarification to the statute.

The scope of the Act's immunity provision is, moreover, of overriding national importance because, as Respondent has urged to this Court, federal "flood control projects" are embodied in "a vast public works program" that include more than nine thousand different facilities and at which "[d]amage to both persons and property is unavoidable." Pet. for Cert., No. 85-434, *United States* v. *James* 20, *cert. granted*, 474 U.S. 978 (1985). Certiorari accordingly should be granted.

1. Petitioner Central Green Company owns and operates a pistachio farm ("the Farm") on approximately one thousand

acres of land in California's San Joaquin Valley ("the Valley"). This suit arises because the Madera Canal ("the Canal"), which conveys irrigation water through the Valley and runs through the Farm, leaks. Among other things, the leaking water creates an extremely shallow water table, which has irreparably damaged Petitioner's pistachio orchard and has increased Petitioner's farming and harvesting costs.

Petitioner accordingly sought compensation for this damage from Respondent United States, which owns the Canal and which designed and built the Canal, as well as from the Madera Irrigation District ("the District"), which is obligated by contract to operate and to maintain the Canal. Petitioner first requested compensation directly from Respondent and the District. When those requests were denied, Petitioner timely filed this suit against Respondent and the District for damages and for an order directing the defendants to repair the Canal.

Respondent United States moved for judgment on the pleadings on the ground that the immunity provision of the Flood Control Act of 1928, 33 U.S.C. 702c, deprived the district court of subject matter jurisdiction. The Act, which authorized the construction of a flood control system in the Mississippi Valley in response to the great flood of 1927, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

Respondent's assertion that the Act applies in this case is extraordinary because the *only* possible link between the damage to Petitioner's Farm and "flood waters" is that the Canal is part of the "Friant Division" of a massive public works project known as the Central Valley Project ("the CVP"), which has as one of its many different purposes "flood control." Respondent does not contend that the Canal itself has even the slightest thing to do with flood control because the Canal conveys *irrigation* water for the aptly named Madera *Irrigation* District. *Accord* App. 9a (court of appeals'

decision; "The canal is not a flood control project and serves no flood control purpose."); Resp. C.A. Br. 5 ("the Madera Canal * * * was used for irrigation").

Petitioner accordingly argued in the district court that Respondent was not entitled to immunity under this Court's decision in *United States* v. *James*, which held that the Act confers immunity only when two conditions are met:

> The Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to [i] all waters contained in or carried through a federal flood control project [ii] *for purposes of or related to flood control*, as well as waters that such projects cannot control.

478 U.S. 597, 605 (1986) (emphasis added). Petitioner assumes for present purposes that (although it is a real stretch), the waters leaking from the Canal conceivably can be said to be "contained in or carried through a flood control project * * * [or] waters that such projects cannot control": the Canal is part of the Friant Division (abeit a part that has nothing to do with flood control), which in turn is one component of the CVP, which in turn has among its several purposes flood control. But there is no apparent basis for even asserting – and Respondent pointedly has never contended otherwise – that the waters met *James*' second prong: that they were carried in the Canal "for purposes of or related to flood control," *id.* The waters, which were in the Canal for purposes of *irrigation*, thus were "related to" flood control only in the sense that – because the Canal is part of the Friant Division, which is part of the CVP, which has as one of its purposes flood control – *all* waters *anywhere* in the entire CVP are "related to" flood control even when they are used exclusively for irrigation, or "to protect, restore, and enhance fish, wildlife, and associated habitats," or for "water conservation," or for "municipal and industrial power," all of which – like "flood control" – are among the CVP's expressly authorized purposes.

Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992). That relationship is not only implausibly attenuated, but it is also plainly insufficient under *James*, which requires both (i) that the waters were "contained in or carried through a federal flood control project" (here, the CVP) *and also* (ii) that they were so carried "for purposes of or related to flood control." The government accordingly is entitled to immunity in this case only if the second prong of the *James* test is ignored or, as the panel below later candidly acknowledged, "delete[d]," App. 7a.

Respondent nonetheless argued in the district court that, *James* notwithstanding, under "the Ninth Circuit's settled position," "section 702c protection [applies] when the would-be flood waters are 'carried thorough a federal flood control project' but are *not* necessarily carried for the specific 'purposes of * * * flood control.'" Court of Appeals Excerpts of Record ("C.A. Rec.") 71 (emphasis in original) (quoting *United States* v. *James*, *supra*, 478 U.S. at 605). In particular, Respondent maintained that the Ninth Circuit consistently holds the United States immune on similar facts notwithstanding that "'[i]n some Circuits the Government's flood-control immunity would *not* constitute a defense in the case of injuries resulting from Government conduct that was unrelated to any flood control purpose.'" *Id.* at 69 (quoting *Hiersche* v. *United States*, *supra*, 503 U.S. at 925 (opinion of Stevens, J., respecting the denial of certiorari)) (emphasis added).[1]

Specifically, in *McCarthy* v. *United States*, 850 F.2d 558 (1988), *cert. denied*, 489 U.S. 1052 (1989), the Ninth Circuit held that the Act confers immunity so long as the plaintiff's

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[1] As Petitioner explains *infra* at 12, Respondent's support for the Ninth Circuit's standard cannot be reconciled with its repeated acknowledgment to *this Court* that immunity is available under *James* only for waters carried "for purposes of or related to flood control."

damages are not "wholly unrelated" to a flood control project. In *Washington* v. *East Columbia Basin Irrigation District*, 105 F.3d 517, *cert. denied*, 552 U.S. 948 (1997), and *Morici Corp.* v. *United States*, 681 F.2d 645 (1982), the Ninth Circuit found that the Act confers immunity even with respect to waters carried in a clearly separate facility – such as an irrigation canal – that serves no flood control function whatsoever, so long as that facility is included in a public works project – such as the CVP – that has as one of its many authorized purposes "flood control." Thus, according to Respondent's motion to the district court, "Under the well-settled Ninth Circuit rule of *McCarthy*, *Morici*, and *East Columbia*, the Madera Canal's irrigation purpose is immaterial, and plaintiff's judicial admission that the Madera Canal is a component of the Central Valley project is dispositive." C.A. Rec. at 146. After emphasizing that the Ninth Circuit had adopted a "but for" test of causality, the government concluded, in language that illustrates perfectly that its theory of immunity is grossly attenuated:

> Because [i] the Madera Canal is *part* of the Central Valley Project, because [ii] the Central Valley project has flood control as *one* of its purposes, and because [iii] plaintiff's damage from seepage of project waters from the Madera Canal was not "*wholly unrelated*" to the use of the Madera Canal, this Court should grant judgment on the pleadings dismissing plaintiff's tort claims for lack of subject matter jurisdiction.

Id. at 149-50 (emphasis added).

Describing the Ninth Circuit precedent cited by Respondent as "very clear," the district court agreed and dismissed the case as to the United States. App. 20a. The court accordingly entered a final judgment as to Respondent, *see* Fed. R. Civ. P. 54(b), and stayed the remainder of the case pending Petitioner's appeal.[2]

2. On Petitioner's timely appeal, Respondent asserted once again that settled Ninth Circuit precedent compelled holding the United States immune from this suit, notwithstanding that the waters which damaged Petitioner were not carried in the Canal "for purposes of or related to flood control" under *James*:

> The damage sustained by Central Green resulting from a water leak from the Madera Canal that was used *for irrigation* is well within this circuit's test for applicability of the flood control immunity created by 33 U.S.C. § 702c. The United States is entitled to immunity if the damage is "not wholly unrelated" to a federal flood control project. *Washington* [v. *East Columbia Basin Irrig. Dist.*, *supra*,] 105 F.3d at 518. In other words, if the damage is related *in any manner* to a project that has flood control as *one* of its purposes, then § 702c immunity attaches. That Madera Canal is part of the Central Valley Project, a multi-purpose project that involves flood control, settles the issue.

Resp. C.A. Br. 5 (emphasis added).

The panel reluctantly agreed that it was bound by Ninth Circuit precedent to affirm the district court's dismissal, but took extraordinary pains to express substantial doubts about the result, to acknowledge the contrary view of other circuits, and to invite this Court to grant certiorari in this case to address the question presented. The panel began by noting that

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[2] Because the Ninth Circuit affirmed the dismissal as to Respondent, this Petition is not premature as interlocutory. *E.g.*, *Geissal* v. *Moore Med. Corp.*, 524 U.S. 74 (1998); *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *Renne* v. *Geary*, 501 U.S. 312 (1991).

> [t]he circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach. Although we have held that immunity protects the government as long as the damage is not wholly unrelated to a project with flood control as one of its purposes, other circuits have found that standard to be too broad and require a more substantial nexus between flood control activities and the damage incurred.

App. 4a. In particular, although some courts agree with the Ninth Circuit's reading of the Act, the panel explained that others read *James* to endorse the "two-part test" discussed *supra* and accordingly to preclude a finding of immunity on these facts. For example:

> The Fourth Circuit looks at the purpose for which the water was being held and ultimately released to determine whether immunity attaches. The Seventh Circuit refuses to grant § 702c immunity unless flood-control activities increased the likelihood of the plaintiff's injuries. The Tenth Circuit has adopted the two part test that requires the existence of a nexus between flood control activity and the plaintiff's injury.

Id. 5a (citing *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995); *Bailey* v. *United States*, 35 F.3d 1118 (7th Cir. 1994); *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978)). Accordingly, the panel below recognized that "had this case been instituted in the Fourth, Seventh or Tenth Circuit[s] the government would probably *not* enjoy flood control immunity." App. 9a (emphasis added).[3]

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[3] As is described fully *infra* at 18-23, Petitioner also would prevail in the Sixth and Eighth Circuits, and likely would prevail in the Fifth Circuit.

Turning to the merits of the dispute, the panel looked to this Court's decision in *James* and expressed serious doubts about the Ninth Circuit's position:

> After reviewing the *James* decision, we are not certain that § 702c should be construed as broadly as our prior decisions. The plain language of the definition of "flood waters" in *James* requires that the water be held in a federal flood control project "for purposes of or related to flood control." 478 U.S. at 605. Our decisions have focused on the "related to" language in the *James* definition and conferred very broad immunity. However, as explained above, the *Morici*, *McCarthy*, and *East Columbia Basin* cases seem to *delete the second requirement* in *James* and grant immunity if the water was contained in a federal flood control project.

App. 7a (emphasis added). The court furthermore recognized that its failure to follow the approach of other circuits has "harsh result[s]":

> The "not wholly unrelated" test applied by this and other circuits reads broadly an already broadly-written grant of immunity. There does not appear to be *any set of facts* where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project. Indeed counsel for the government admitted at oral argument that she could not think of *any situation* where § 702c would not confer immunity.

Id. 8a-9a (emphasis added).

Because its decision conflicted with this Court's holding in *James* that the Act confers immunity only with respect to waters carried "for purposes of or related to flood control," as well as with decisions of several other circuits, the panel below concluded by issuing an extraordinary invitation to this Court to grant certiorari to resolve the question presented:

> In denying certiorari to a case that could have resolved the conflict in circuit opinions on this issue, Justice Stevens suggested that this split in the circuits could be "resolved more effectively by Congress." *Hiersche* v. *United States*, 503 U.S. 923, 925 (1992). While agreeing with Justice Stevens, we believe this case might be an appropriate subject for Supreme Court review.

App. 9a.[4]

3. This Petition followed.

REASONS FOR GRANTING THE WRIT

As the panel below acknowledged, the decision below conflicts not only with this Court's holding in *United States* v. *James*, *supra*, that the Flood Control Act of 1928 grants immunity only for waters carried in a flood control project "for purposes of or related to flood control," 478 U.S. at 605, but also with decisions of other circuits that have been faithful to *James* and that would reject Respondent's claim of immunity in this case. The scope of Respondent's liability is, moreover, of overriding national importance in light of the many thousands of federal flood control projects around the country at which, as Respondent advised this Court in *James*, "[d]amage to both persons and property is unavoidable." Pet. for Cert., No. 85-434, *United States* v. *James*, *supra*, at 20. There is no reason to believe that Congress will address the substantial confusion surrounding the government's immunity. Certiorari accordingly should be granted.

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[4] Petitioner's complaint specified that the leaking water had caused "subsurface flooding" on the Farm. But, as Respondent has expressly acknowledged and the lower courts concluded, the government is not entitled to immunity unless the requirements of *United States* v. *James*, *supra*, are satisfied as well. Pet. App. 3a, 11a-12a, C.A. Rec. 68 & n.1.

I. The Decision Below Conflicts With *United States* v. *James*.

In *United States* v. *James*, this Court held that the Flood Control Act confers immunity for damage caused by the operation of "federal flood control facilities *to prevent flooding*." 478 U.S. at 605 n.7 (emphasis added). The case arose from two accidents in which the government negligently failed to provide sufficient warning before releasing water to reduce flood control reservoirs from flood stage, causing recreational boaters to be swept away to their deaths. Relying on the plain text of the statute – which applies to "any damage from or by floods or flood waters at any place," 33 U.S.C. 702c – this Court rejected the assertion that the Act does not apply to "the negligent or wrongful acts of government employees." *Id.* at 603 (citation and quotation marks omitted).

The decision below conflicts with *James*, which distinguished carefully among the Act's terms. Regarding the Act's references to "liability of *any* kind," "*any* damage," and "*any* place," the Court described the statute as "sweeping," such that it is "difficult to imagine broader language." 478 U.S. at 604 (emphases in *James*). But regarding the Act's separate reference to "floods or flood waters" – on which the instant case turns – *James* explained that the government's immunity is limited:

> The Act concerns flood control projects designed to control floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters [i] contained in or carried through a federal flood control project [ii] *for purposes of or related to flood control*, as well as to waters that such projects cannot control.

478 U.S. at 605 (emphasis added). This Court emphasized the second of these requirements in an accompanying footnote, which took pains to explain that "the District Court in each case found that the waters were being released from fed-

eral flood control facilities *to prevent flooding*." *Id.* at 605 n.7 (emphasis added). The Court made the same point when it rejected the plaintiffs' claim that "their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control" on the ground that "the release of the waters * * * was *clearly related to flood control*." *Id.* at 609-10 (emphasis added).[5]

In this case, both the Ninth Circuit and Respondent acknowledged that the Canal's only function is to carry *irrigation* water; it has nothing to do with flood waters. *See supra* at 4a-5a. There is, accordingly, no reasonable basis for asserting that the waters were carried "for purposes of or related to flood control" as *James* requires. Instead, as the panel below recognized, Respondent was awarded immunity in this case only because settled Ninth Circuit precedent has "delete[d]" *James*' second requirement. App. 7a. Respondent's support for the Ninth Circuit's view of *James* is surprising because Respondent repeatedly has acknowledged to *this Court* that the two-prong test represents *James*' holding and accordingly is binding precedent. Br. of Resp. in Opp., No. 91-774, *Hiersche* v. *United States* 5; Br. of Resp. in Opp., No. 89-829, *Dewitt Bank & Trust Co.* v. *United States* 4; Br. of Resp. in Opp., No. 88-919, *McCarthy* v. *United States* 4.[6]

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[5] Nor does the Act's legislative history suggest a broader application of Respondent's immunity. As *James* explains, the legislative history, although "broad and emphatic," 478 U.S. at 608, only "reinforces the plain language of the immunity provision," which as noted extends only to waters carried "for purposes of or related to flood control," *id.* at 605-06. There is no indication in the legislative history that Congress conceived that the Act's immunity provision would extend to irrigation waters in an irrigation canal. To the contrary, as *James* explains, it was "the intention of Congress to protect the Federal Government from any damages liability that might arise *out of flood control*." *Id.* at 612 (emphasis added).

[6] *James* itself rejected Respondent's effort to expand its immunity further. The government had argued in its brief in *James* that "[s]ince Congress was legislating with respect to flood control projects designed to carry flood waters, the conclusion is inescapable that the statute refers to all waters contained in or carried through such structures as well as waters the structures could not retain." Br. for United States, No. 85-434, *United States* v. *James* 17. This Court adopted that statement from the government's brief almost verbatim, except that it added the critical caveat that the Act applies only to waters carried "for purposes of or related to flood control." 478 U.S. at 605.

II. The Decision Below Conflicts With Rulings Of Several Other Circuits.

1. a. The panel in this case recognized that "[t]he circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach" and that Respondent would not be accorded immunity in several other circuits. App. 4a. But, purporting to find order in this chaos, Respondent recently has taken the contrary view that "the courts of appeals are not truly divided on this issue." Br. of Resp. in Opp., No. 99-390, *Paulk* v. *United States* 6. Specifically, Respondent distinguishes between two classes of cases:

> In a number of cases involving [i] injuries with a *nexus to flood control projects*, courts of appeals have held that the government is immune from suit. In other cases, involving [ii] activities *unrelated to the projects' flood control functions*, or waters found not to be "flood waters" within the meaning of Section 702c, courts of appeals have rejected the United States' immunity defense.

Id. at 7-8 (footnotes omitted) (emphasis added).

Respondent's categorization of the circuits' decisions is illusory because it confuses (i) whether the plaintiff was injured at a flood control *project* with (ii) whether the *conduct* that caused the injury was related to flood control *activities*. In a sense, this is the difference between a noun (the flood

control project) and a verb (the flood control activities). For example, both conditions were satisfied in *James*, in which the plaintiffs' injuries (i) arose on flood control projects (the lakes) and also (ii) were caused by governmental conduct related to flood control activities (releasing water to reduce the lakes from flood stage). The present conflict in the circuits, by contrast, arises from cases in which the latter condition is not satisfied, *i.e.*, in which the government claims immunity for actions unrelated to its flood control activities. To put this in the terms of Respondent's erroneous attempt to make the circuits' conflicting decisions consistent, in many cases in which the plaintiff's claim arises at "federal flood control *projects*" (such as a flood control dam or lake), the plaintiff's claim nonetheless rests on the government's "activities unrelated to the projects' flood control *functions*" (such as irrigation).

This case is the perfect example. Because the waters leaking from the Canal are related to a "flood control project" in the sense that one of the purposes of the CVP is flood control, Respondent cites the Ninth Circuit's decision in this case as granting immunity based on a "nexus" to "a flood control project." Br. of Resp. in Opp., No. 99-390, *Paulk* v. *United States*, *supra*, at 7 n.3. But Petitioner's allegations plainly arise from the government's "activities unrelated to the [CVP's] flood control *functions*," because the purpose of the Canal is to carry *irrigation* water. Thus, under Respondent's formulation, the government should *not* be immune in this case. In particular, there is no basis to distinguish this case from decisions of several other circuits that, as Respondent acknowledges, reject the government's assertion of immunity for conduct that occurred at a flood control facility but was unrelated to flood control efforts. *Id.* at 8 & n.4; *see also infra* at 18-23 (discussing conflict between Ninth Circuit's decision in this case and *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no immunity when government employee was driving boat on flood control lake), *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity when

flood control dam was opened to generate electricity), *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity when flood control lake was used for recreational purposes), and *Hayes* v. *United States*, 585 F.2d 701 (4th Cir. 1978) (no immunity when flood control dam was opened for any purpose other than flood control)).

b. Respondent also invokes the Sixth Circuit's statement in *Cantrell* v. *United States* that "the differences between the circuits have more to do with the facts of the particular cases * * * than with a dispute about the meaning of § 702c," such that the court could find "no case whose facts and ultimate holding may not be reconciled with our method." Br. of Resp. In Opp., No. 99-390, *Paulk* v. *United States*, *supra*, at 6-7 (quoting 89 F.3d 268, 272-73 (1996)). The Sixth Circuit's "method" is to focus on the alleged wrongful conduct and to deny the government immunity if "the plaintiff can recover without holding the government liable for a privileged activity – i.e., an activity (or a physical phenomenon caused by an activity) somehow necessary in the government's battle to control floods." 89 F.3d at 274.

Respondent's reliance on *Cantrell* is, to say the least, surprising. The Sixth Circuit's attempt to rationalize the circuits' various decisions based on whether the government's tortious conduct was part of its flood control activities, 89 F.3d at 272-73, *conflicts* with Respondent's own categorization of the courts of appeals' decisions. Thus, in opposing certiorari from a Ninth Circuit decision that expressly *refused* to follow *Cantrell*, Respondent proposed the *identical* categorization as in its recent brief in the *Paulk* case, *see supra*, but frankly acknowledged that "the Sixth Circuit has *departed* from [the] fact-specific inquiry into the causal connection between the particular injury involved and federal flood control activities [used by other circuits], requiring instead a connection between federal flood control efforts and the alleged tortious conduct to support immunity under Section 702c." Br. of Resp. in Opp., No. 97-1039, *Merritt* v. *United States* 6 n.2, 8

(emphasis added) (citing *Cantrell* v. *United States*, *supra*); Pet. for Cert., No. 97-1039, *Merrit* v. *United States*, App. (Ninth Circuit's ruling; "Finally, we decline plaintiffs' invitation to adopt the analysis of *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996). * * * We cannot adopt a new standard, however, when our own precedent on this issue is so clear. Even the court in *Cantrell* acknowledged that its analysis *departed from our precedent*." (emphasis added)); *see also Cantrell* v. *United States*, 89 F.3d at 273-74 (acknowledging that Sixth Circuit "analyze[s] the problem before us in a different manner than other appellate courts have in the past"); Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 9-10 n.4 (acknowledging that *Cantrell* departed from Ninth Circuit's standard).

In addition, *Cantrell*'s attempt to rationalize the circuits' various tests expressly *excluded* the Ninth Circuit's standard, which the Sixth Circuit explained would reach a contrary result and which "makes little sense in light of the text and purposes of the Act." 89 F.3d at 271; *see also id.* ("If faced with our case, the Ninth Circuit probably would note that Fishtrap Lake is used for flood control and *affirm the dismissal without further inquiry*." (emphasis added)). The most that the Sixth Circuit could say was that, as of that date, "[t]he circuit courts with the toughest-sounding tests, like the Ninth Circuit, report no cases where the plaintiff's theory of liability did not involve a challenge to the government's flood control activities or the government's decisions about how to maintain flood control waters." *Id.* at 272. But that is no longer true because, as the Sixth Circuit anticipated, the Ninth Circuit has subsequently extended the government's immunity to cases in which the plaintiff's claim arose from irrigation waters unrelated to the government's flood control efforts, including in this case. *See also Washington* v. *East Columbia Irrig. Dist.*, *supra*, 105 F.3d 517. As is discussed *infra* at 18-19, the Ninth Circuit's decision in this case therefore conflicts directly with the Sixth Circuit's decision in *Cantrell*, under which Respondent would be denied immunity.

Other courts, and indeed a Justice of this Court, accordingly have been correct in their repeated recognition that the conflict in the circuits over the scope of Respondent's immunity under the Flood Control Act is both substantial and outcome determinative. Thus, Justice Stevens recognized seven years ago that the government's assertion that it was immune under the Act for "conduct that was unrelated to any flood control purpose" had given rise to "a recurring conflict among the courts of appeals." *Hiersche* v. *United States*, *supra*, 503 U.S. at 923; *see also Zavadil* v. *United States*, 498 U.S. 1108 (1991) (noting that White, J., would grant certiorari). In fact, Respondent in its brief below *agreed* with Justice Stevens' assessment. *See supra* at 5.

Similarly, the Seventh Circuit has recognized that the circuits regularly reach "inconsistent results" in "cases inquiring whether the source of harm had some nexus to flood control," such that "it is not even settled with what there must be a flood control nexus–the project, the risk that led to the particular accident, or the plaintiff's injury." *Bailey* v. *United States*, 35 F.3d 1118, 1120-21 (1994) (collecting cases). And, as the Ninth Circuit explained in an earlier decision, this Court's "failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases." *Washington* v. *East Columbia Basin Irrig. Dist.*, *supra*, 105 F.3d at 519 n.3; *see also Boudreau* v. *United States*, 53 F.3d 81, 83 (5th Cir. 1995) ("[T]here is disagreement among the circuits on the application of § 702c." (collecting cases)), *cert. denied*, 516 U.S. 1071 (1996); *Dawson* v. *United States*, 894 F.2d 70, 73 (3d Cir. 1990) ("The courts of appeals which have considered section 702c immunity post-*James* have not interpreted the 'wholly unrelated' standard uniformly." (collecting cases)); *cf. Fisher* v. *United States*, 31 F.3d 683, 685 (8th Cir. 1994) (Gibson, J., dissenting) ("In recent years several decisions of other circuits have called into question the broad scope of this statute.").

2. The panel below specifically was correct to conclude that Respondent would not be entitled to immunity in several other circuits. App. 9a. In particular, Respondent's assertion of immunity clearly would be rejected by the Fourth, Sixth, Eighth, and Tenth Circuits, and likely would be rejected in the Fifth and Seventh Circuits as well.

a. In *Cantrell* v. *United States*, *supra*, the plaintiff, who was injured when an Army Corps of Engineers boat crashed on a federal flood control lake, sued the United States for negligence in operating the boat. The Sixth Circuit held that "the Flood Control Act does not protect the government from a claim of negligence, even one arising from an accident on a lake used as a flood control reservoir, unless an act constituting part or all of the alleged breach of the duty of care was *an act undertaken to control flooding*." 89 F.3d at 269 (emphasis added). Put another way, the inquiry "is whether the plaintiff can recover without holding the government liable for a privileged activity – *i.e.*, an activity (or a physical phenomenon caused by an activity) somehow necessary in the government's battle to control floods." *Id.* at 274. Under that standard, the Act did not apply:

> Cantrell is clearly not challenging flood control decisions, as his counsel repeatedly stressed at oral argument. He has only one theory of liability: the pilot's negligence. Since the pilot's negligence was not part of government activity to control floods or flood waters, the immunity clause of the Flood Control Act is irrelevant to Cantrell's claim.

Id. at 273.

Under Sixth Circuit precedent, Respondent is not entitled to immunity in this case. Because Petitioner's theory of liability relates to irrigation water leaking from an irrigation canal, the allegations against Respondent have nothing at all to do with flood control or "the government's battle to control floods." As noted above, the Sixth Circuit specifically recog-

nized that the Ninth Circuit and it would reach conflicting results:

> [In the Ninth Circuit], [i]f the accident had anything to do with a flood control lake, or the management of a flood control lake, then the plaintiffs cannot sue. If faced with our case, the Ninth Circuit probably would note that [the lake] is used for flood control and affirm the dismissal without further inquiry.

89 F.3d at 271. Applying its decision in *Cantrell*, the Sixth Circuit would not find immunity in this case because "there [is] no meaningful causal nexus between the [leaking canal] and flood control activity even if the [canal] was 'related' to a flood control project, and even if the construction of the [project] was a 'but for' cause of the injury." *Id.*

b. In *Henderson* v. *United States*, 965 F.2d 1488, 1490 (8th Cir. 1992), the plaintiff's husband was killed when the government released water from a flood control dam "to generate hydroelectric power." Applying settled circuit precedent, the Eighth Circuit held that "section 702(c) immunity applies if 'governmental control of flood waters was a substantial factor in causing [the plaintiff's] injuries.'" 965 F.2d at 1492 (citations omitted). Under this standard, the government was not entitled to immunity in *Henderson* "because the dam activity * * * was related to generating electricity and not to flood control." 965 F.2d at 1492. Under the Eighth Circuit's standard, Respondent is not entitled to immunity in this case because, just as the waters in *Henderson* were used for "generating electricity" and not for "control of flood waters," the waters that damaged Petitioner's Farm were used to *irrigate*.

c. In *Boyd* v. *United States*, 881 F.2d 895, 899 (10th Cir. 1989), the plaintiff's husband was killed while snorkeling in a lake "created by the [Corps of Engineers] for flood control purposes" when he was struck by a boat. Expressly rejecting the two Ninth Circuit precedents on which Respondent prin-

cipally relied below, the Tenth Circuit held that immunity is available only for waters "being actively being used for flood control purposes." 881 F.2d at 900 (refusing to follow *McCarthy* v. *United States*, *supra*, 850 F.2d 558, and *Morici Corp.* v. *United States*, *supra*, 681 F.2d 645). The court explained that "Congress' concern was to shield the government from liability associated with *flood control operations*." *Id.* (emphasis added). The Ninth Circuit's contrary view, by contrast, confers immunity in circumstances "too attenuated to warrant the invocation of § 702c." *Id.*; *see also Holt* v. *United States*, 46 F.3d 1000, 1004 n.2 (10th Cir. 1995) (adhering to *Boyd* notwithstanding that "[o]ther circuits have rejected *Boyd*'s disapproval of the wholly unrelated standard and its determination that governmental operation of a dam as a recreational facility does not provide sovereign immunity"). In subsequent rulings, the Tenth Circuit has explained that *Boyd* adopts a two-part test:

> [A] court must examine whether (1) there is a "flood control project" that triggers the Act, and (2) a nexus exists between flood control activities and the injuries sustained. The inquiry under the nexus prong is primarily a factual one whereby a court must determine the nature of the activity creating the nexus with the injury.

Holt v. *United States*, *supra*, 46 F.3d at 1004 (quoting *Williams* v. *United States*, 957 F.2d 742, 743 (10th Cir. 1992); *Boyd* v. *United States*, *supra*, 881 F.2d at 900) (internal quotation marks omitted).

Under Tenth Circuit precedent, Respondent is not entitled to immunity in this case. In *Holt*, in which the government had an "underlying flood control purpose" in releasing water from a flood control dam, the Tenth Circuit found immunity. 46 F.3d at 1004. By contrast, in *Boyd*, the Tenth Circuit denied immunity because the flood control dam in question was used for recreational purposes. 881 F.2d at 900. Just as the waters in *Boyd* were used for recreation, the waters that

leaked onto Petitioner's Farm in this case had no "flood control purpose" but instead were used only for irrigation and accordingly do not bear the "nexus" to flood control required by the Tenth Circuit.

d. The Tenth Circuit's decision in *Boyd* parallels the approach of the Fourth Circuit in *Hayes* v. *United States*, 585 F.2d 701 (1978). In *Hayes*, the plaintiff sued the United States for damages caused by erosion that resulted from operation of a federal flood control dam. The court held that immunity under the Act does not extend to all activities related to a federal flood control facility but instead is "confined to damage from flooding which allegedly occurred *because of the government's antiflooding activity*." 585 F.2d at 702 (emphasis added); *see also id.* (immunity applies "if the release of the waters which allegedly damaged the farm was a consequence of the dam's operation *as a flood control project*" (emphasis added)); *Cox* v. *United States*, 827 F. Supp. 378, 380 (N.D. W.Va. 1992) (adhering to *Hayes*); C.A. Rec. 69 (Respondent's brief in district court; nothing Ninth Circuit's repeated rejection of *Hayes*). The Fourth Circuit accordingly remanded to allow the district court to determine "[i]f the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project," in which case "he would avoid the absolute bar of § 702c." *Id.* Under Fourth Circuit precedent, Respondent is not entitled to immunity in this case because the Canal was used only for purposes of irrigation, not flood control.

e. The fact that the Ninth Circuit in this case found Respondent immune for damage caused by an irrigation canal that has no flood control functions, while the above-cited cases denied immunity for injuries that arose at flood control facilities such as dams and lakes, substantially heightens the circuit conflict. *See Cantrell* v. *United States*, *supra*, 89 F.3d at 269 ("lake used as a flood control reservoir"); *Henderson* v. *United States*, *supra*, 965 F.2d at 1492 (dam "was created,

in part, for flood control purposes"); *Boyd* v. *United States*, *supra*, 881 F.2d at 899 (lake "was created by the [Corps of Engineers] for flood control purposes"); *Hayes* v. *United States*, *supra*, 585 F.2d at 701 (dam operated "as a flood control facility"). The damage in this case is far more attenuated from any activity related to flood control because it is not disputed that that the leaking irrigation canal "is not a flood control project and serves *no* flood control purpose." App. 9a (emphasis added). Put another way, because the Fourth, Sixth, Eighth, and Tenth Circuits would deny immunity even for damages arising from government irrigation activities *at a flood control lake*, *see supra*, they certainly would deny immunity when that damage occurs at an irrigation canal unconnected to flood control efforts.

f. Respondent also likely would not be accorded immunity in the Fifth or Seventh Circuits. Although the issue is not settled in the Seventh Circuit, that court has focused its inquiry on whether "flood control activities increase[d] the probability" of the plaintiff's injury. *Bailey* v. *United States*, *supra*, 35 F.3d at 1124 (remanding for determination by the district court). *Accord Hiersche* v. *United States*, *supra*, 503 U.S. at 925 (Opinion of Stevens, J., respecting the denial of certiorari); App. 9a (court of appeals' opinion; concluding that Respondent likely would not be accorded immunity in Seventh Circuit). Under that standard, Respondent would not be entitled to immunity because only irrigation, not federal flood control efforts, damaged Petitioner.

The Fifth Circuit, in applying its "fact-specific" test, recently has denied immunity where the plaintiff, while standing on a beach fronting a flood control lake, was injured by a live electrical cable that was exposed by receding waters in the lake but was not itself "used in connection with flood control." *Kennedy* v. *Texas Utils.*, 179 F.3d 258, 260 (1999). Although *Kennedy* conceivably can be distinguished on the ground that the injury in that case was not caused by water, the court rested its holding on the fact that although the injury

occurred at a flood control facility, "[t]he electrical cable that injured Kennedy had no association with flood control, and the federal government's alleged malfeasance or nonfeasance bore no relation to flood control." 179 F.3d at 263. So, too, in this case, Plaintiff was damaged as a result of actions and a facility (the Canal) that have "no association with flood control." Accordingly, the Fifth Circuit likely would deny immunity in this case.

III. This Is A Recurring Question Of National Importance That Should Be Resolved By This Court.

There is no reason for this Court to delay resolving the circuit conflict over the proper scope of the government's immunity under the Flood Control Act. As Respondent urged this Court in *James*, the Act's immunity provision frequently is called into question because "[d]amage to both persons and property is unavoidable" at the more than nine thousand different flood control projects around the nation. Pet. for Cert., No. 85-434, *United States* v. *James*, supra, *at* 20. Justice Stevens therefore was surely correct when, noting that "the number and importance of federal flood-control projects has grown dramatically," he described the "recurring conflict among the courts of appeals" as "assum[ing] greater and greater importance." *Hiersche* v. *United States*, *supra*, 503 U.S. at 923.

Nor is there any reason to allow the question presented to percolate further, given that "[s]ince *James* many appellate courts have addressed the relationship between flood control activity and a plaintiff's injury that is necessary to allow the government to invoke the immunity provision of the Act," *Cantrell* v. *United States*, *supra*, 89 F.3d at 271, and the conflicting provisions have been thoroughly ventilated in the circuits as a result, *see supra* at 13-17. Certiorari is warranted in this case, in contrast with earlier petitions that called the scope of the Act into question, because the Ninth Circuit frankly has acknowledged that its decision conflicts with this

Court's decision in *James*, because an intractable circuit conflict now exists, and because this Petition presents an appropriate vehicle to resolve the conflict. *See supra* at 16 (describing development of conflict subsequent to Sixth Circuit's decision in *Cantrell* v. *United States*, 89 F.3d 268 (1996)); Pet. App. 7a (acknowledging that Ninth Circuit has "delete[d]" *James*' requirement that waters must be carried "for purposes of or related to flood control"). *Compare, e.g.*, Br. of Resp. in Opp., No. 97-1039, *Merritt* v. *United States* 9 (certiorari is inappropriate because "the record below * * * establishes a clear factual nexus between the injury in this case and federal flood control activities"); Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 10 (certiorari is inappropriate because "petitioner does not argue that this case would have been decided differently under any other circuit's approach").[7]

Certiorari furthermore is warranted because the scope of Respondent's immunity under the Act presents a straightforward question of statutory construction that falls squarely within this Court's role as the final arbiter of federal law. To the extent that there was some possibility that Congress might amend the Act to clarify its scope, *see Hiersche* v. *United States*, *supra*, 503 U.S. at 925 (opinion of Stevens, J., respecting the denial of certiorari), it is now plain that Congress is not going to intervene, and Respondent has never suggested

[7] In addition, in opposing certiorari from another Ninth Circuit decision, the government characterized the Petition as merely presenting the question "whether a multi-purpose project may be subdivided into different parts, some of which enjoy Section 702c immunity and some of which do not." Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 5. That is not true of the question presented by this Petition, which directly raises the nexus required under the Act between the government's flood control efforts and the damage incurred by the plaintiff.

otherwise. [8] The scope of the government's immunity under the Flood Control Act accordingly will remain the subject of substantial uncertainty until this Court rules on the question presented. Unless this circuit conflict is to be deemed "off limits" from this Court's jurisdiction for reasons that not only escape private litigants and the bar but also conflict with the guidance provided by S. Ct. R. 10, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition or a Writ of Certiorari should be granted.

Respectfully submitted,

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November 19, 1999

[8] Respondent has made the distinct argument that it would be inappropriate for this Court to overrule *United States* v. *James*, *supra*, because "any *change* to the immunity rule must come from Congress." Br. of Resp. in Opp., No. 99-390, *Paulk* v. *United States*, *supra*, at 6 (emphasis added). But in light of the many similar petitions for certiorari filed by the government in recent years, Respondent appropriately has not maintained that Congress is the institution best suited to resolve the current circuit split over the scope of the Act's immunity provision.

Central Green Company,
a California Limited Partnership,
Plaintiff-Appellant,
v.
United States of America;
Madera Irrigation District,
Defendants-Appellees.

No. 97-17321.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 6, 1998.

Decided May 20, 1999.

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

I. OVERVIEW

Central Green Company ("Central Green") appeals a district court decision dismissing its claims against the United States for lack of subject matter jurisdiction. Central Green sued the United States under the Federal Tort Claims Act for damage to its pistachio farm caused by subsurface and surface water flooding from the Madera Canal. The district court dismissed the action for lack of subject matter jurisdiction, finding that Central Green's claims were barred by 33 U.S.C. § 702c immunity for management of flood control waters. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II. BACKGROUND

Appellant Central Green owns one thousand acres of pistachio orchards in Madera County, California. The Madera Canal is a federal water management project that runs through Central Green's property, conveying irrigation water throughout the San Joaquin Valley. Although flood control is not one of the stated purposes of the Madera Canal, the Madera Canal is part of the Central Valley Project, which has flood control as one of its congressionally authorized purposes. The United States owns the Madera Canal but has entered into an agreement giving the Madera Irrigation District and the Chowchilla Water District authority to operate and maintain the Madera Canal.

Central Green sued the United States and the Madera Irrigation District alleging that due to negligent planning, design, construction, or maintenance, the Madera Canal is leaking, causing surface and subsurface flooding of Central Green's property. Central Green also alleges that subsurface flooding created a shallow water table, resulting in irreparable harm to Central Green's pistachio orchard and increasing farming and harvesting costs.

Asserting § 702c immunity, the United States moved for judgment on the pleadings. The district court granted the United States's motion and dismissed Central Green's claims against the United States. The district court also stayed Central Green's claims against Madera Irrigation District pending resolution of this appeal.

III. STANDARD OF REVIEW

A district court's conclusion that it lacks subject matter jurisdiction is reviewed de novo. *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 916 (9th Cir. 1996).

IV. DISCUSSION

A. Immunity under § 702c of the Flood Control Act

Section 702c confers broad immunity for claims arising from the design, operation, or management of federally authorized flood control projects. Specifically, it provides that

"[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c (1994). In *United States v. James*, 478 U.S. 597 (1986), the Supreme Court, in interpreting § 702c, noted that "[i]t is difficult to imagine broader language." Indeed, the only limitation in the plain language of the statute is that the United States is only immune from damage caused by "floods or flood waters."

B."Flood Waters"

Central Green's sole argument on appeal is that the water that caused damage to its pistachio farm was not "flood water" because it was held for irrigation purposes rather than flood control. For support, Central Green relies on the Supreme Court's decision in *James*. In *James*, the plaintiffs were injured when they were swept through a dam as water was released to control flooding. *Id.* at 599. The Supreme Court held that § 702c protected the government from damages caused by failure to warn boaters of impending danger caused by releasing water through federal flood control projects. *Id.* at 604. The Supreme Court also addressed the issue of what constituted "flood waters" and held that

> [i]t is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

Id. at 605.

Relying on this definition, Central Green argues that the Supreme Court created a two-part test to determine when water is "flood water." Central Green's proposed two-part test would require that for water to be "flood water" it would have to (1) pass through a flood control project and (2) be for the purposes of or related to flood control. Ultimately, Central Green argues that because the water that damaged its crops

was held for irrigation and not flood control purposes, § 702c immunity should not apply.

Central Green's argument raises an apparent contradiction in the *James* decision. In the footnote to the definition of "flood waters," the Supreme Court favorably cited both *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982), and *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978). *James*, 478 U.S. at 605 n. 7. Although both *Morici* and *Hayes* provide that there is no immunity for flooding caused by federal projects unrelated to flood control, *Morici*, 681 F.2d at 647, the two cases appear to be inconsistent. *Morici* applied the "not wholly unrelated" test and held that the purpose for which the project was being operated at the time of the flood damage was irrelevant to the issue of whether immunity applied. 681 F.2d at 648 ("Even if the project was being operated at the time of the negligence for a purpose other than flood control, the operation that caused the damage was not 'wholly unrelated' to a Congressionally authorized flood control project."). Conversely, *Hayes* held that whether immunity attached depended on the operation of the flood control project at the time of the injury. 585 F.2d at 702-3.

The apparent contradiction between these two cases and the resulting question about the definition of "flood waters" has been debated in the circuit courts. *See Boudreau v. United States*, 53 F.3d 81, 84-85 (5th Cir. 1995) (discussing the split in the circuits over the correct application of *James*); *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir. 1990) (noting the disagreement between the circuits). The circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach. Although we have held that immunity protects the government as long as the damage is not wholly unrelated to a project with flood control as one of its purposes, other circuits have found that standard to be too broad and require a more substantial nexus between flood control activities and the damage incurred. Compare *Washington v. East Columbia Basin Irr.*

Dist., 105 F.3d 517, 519 (9th Cir.), *cert. denied*, 118 S. Ct. 364 (1997), *with Holt v. United States*, 46 F.3d 1000, 1004-05 (10th Cir. 1995), *and Boyd v. United States*, 881 F.2d 895, 899-900 (10th Cir. 1989).

Central Green's two-part test finds support in other circuits. The Fourth Circuit looks at the purpose for which the water was being held and ultimately released to determine whether immunity attaches. *Hayes*, 585 F.2d at 702-03 ("If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c."). The Seventh Circuit refuses to grant § 702c immunity unless flood-control activities increased the likelihood of the plaintiff's injuries. *Bailey v. United States*, 35 F.3d 1118, 1124 (7th Cir. 1994) (remanding for a hearing to determine whether injuries resulted from flood control activities); *Fryman v. United States*, 901 F.2d 79, 82 (7th Cir. 1990) (same). The Tenth Circuit has adopted the two part test that requires the existence of a nexus between flood control activity and the plaintiff's injury. *Holt*, 46 F.3d at 1004-05.

Despite support for the two-part test in other circuits, we have consistently focused on the "related to" language in the definition of "flood waters" and rejected Central Green's argument. *See East Columbia Basin*, 105 F.3d at 519-20; *McCarthy v. United States*, 850 F.2d 558, 562-63 (9th Cir. 1988); *Morici*, 681 F.2d at 648. We first announced the "not wholly unrelated" test in *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966). In *Peterson*, engineers at the Ladd Air Force base in Alaska dynamited ice and snow that was collecting and damming the flow of a river. *Id.* at 275. The explosion caused a large discharge of ice and water downstream, damaging Peterson's vessel. *Id.* We held that immunity did not protect the government's actions because "[t]he decision to dynamite the ice jam was wholly unrelated to any act of Congress authorizing expenditures of federal funds for

flood control, or any act undertaken pursuant to any such authorization." *Id.* We also distinguished dynamiting the ice jam from government programs aimed at preventing or minimizing damage caused by floods. *Id.* at 275-76.

Later in *Morici*, we again addressed the scope of § 702c. In *Morici*, the plaintiff argued that negligent operation of a dam and reservoir resulted in excessively high levels of water in the Sacramento River which caused water to seep out, damaging plaintiff's farm. 681 F.2d at 646. Morici did not argue that the water that damaged its crops was not flood water but argued instead that the negligent release of water from the dam was wholly unrelated to flood control activities. *Id.* at 647. We held that it was not the purpose of the specific release but rather the congressionally authorized purpose of the project which conferred immunity. *Id.* at 648. We also noted the impossibility of scrutinizing every release from a dam to determine when immunity attached. *Id.* Consequently, we do not look at the purpose or use of the project at the time of the damage. *Morici* requires that we look at what purposes Congress has authorized the project to perform. Although the dam at the time of Morici's injury was not performing a flood control purpose, the dam was a congressionally authorized flood control project and was therefore protected by § 702c immunity.

After *Morici* was decided, the Supreme Court issued the *James* opinion. After *James*, we addressed § 702c immunity in *McCarthy*. In *McCarthy*, the plaintiff was injured when he dove into a shallow area of a lake owned by the United States and fractured his neck. 850 F.2d at 559. Plaintiff argued that the government was negligent in failing to warn divers of the known risks. *Id.* at 559-60. We held that immunity applied and that the water in the lake was "flood water" because (1) the lake was a federal flood control project and (2) because the level of the lake was monitored daily and released through the dam when necessary. *Id.* at 561. Again, we expressly rejected the argument that immunity was determined by the current use of the federal flood control project. *Id.* at 561-62. Although the lake in *McCarthy* was being used primarily for recreational purposes at the time of McCarthy's injury, immunity attached because the lake was behind a dam constructed as part of a congressionally authorized flood control project. *Id.* at 562 ("So long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity continues to attach.").

The most recent Ninth Circuit case dealing with flood control immunity is *East Columbia Basin*. In *East Columbia Basin*, an irrigation canal's retaining walls burst, flooding areas around Moses Lake, Washington. 105 F.3d at 519. The irrigation canal was part of the Columbia Basin Project that has flood control as one of its congressionally authorized purposes. *Id.* at 519-520. We held again that the congressionally authorized purpose of the project as a whole, not the actual purpose for which the project was being operated, was dispositive in determining whether immunity applied. *Id.* We concluded that the government had immunity because the canal was part of a larger project with flood control as one of its purposes.

After reviewing the *James* decision, we are not certain that § 702c should be construed as broadly as our prior decisions. The plain language of the definition of "flood waters" in *James* requires that the water be held in a federal flood control project "for purposes of or related to flood control." 478 U.S. at 605. Our decisions have focused on the "related to" language in the *James* definition and conferred very broad immunity. However, as explained above, the *Morici*, *McCarthy*, and *East Columbia Basin* cases seem to delete the second requirement in *James* and grant immunity if the water was contained in a federal flood control project.

Our prior holdings are not without support. As the Supreme Court noted in *James*, Congress drafted § 702c with the intent of conferring broad immunity. *Id.* at 607-08 (discussing the legislative history of § 702c). Congress was

willing to provide flood protections at great costs to the government but did not want to be liable for any costs other than construction. *Id.* Thus the broad immunity conferred by the "not wholly unrelated" test may be congressionally mandated. Additionally, other circuits have also adopted approaches similar to ours. *See Reese v. South Florida Water Management Dist.*, 59 F.3d 1128, 1130-31 (11th Cir. 1995) (holding that any water held in a flood control project is "flood water" regardless of the purpose for which the water is being used); *Boudreau v. United States*, 53 F.3d 81, 85-86 (5th Cir. 1995) (extending immunity to preclude claims for damages arising out of activities including management of recreational activities arising out of management of flood control project); *Fisher v. United States Army Corps of Engineers*, 31 F.3d 683, 684-85 (8th Cir. 1994) (holding that flood control immunity applies when government flood control activities is a substantial cause in the injury); *Dawson v. U.S.*, 894 F.2d 70, 73-74 (3d Cir. 1990) (adopting this circuits [sic] reasoning in *McCarthy*).

In light of our prior holdings, we are required to affirm the district court decision. The Madera Canal is part of the Central Valley Project which has flood control as one of its congressionally authorized purposes. As part of the Central Valley Project, the Madera Canal itself is a congressionally authorized flood control project. *See East Columbia Basin*, 105 F.3d at 520; *Morici*, 681 F.2d at 647. Although the water in the Madera Canal was not held for the purpose of flood control, because it was part of the Central Valley Project, it was "not wholly unrelated" to flood control. *See Morici*, 681 F.2d at 648. As interpreted by this circuit, § 702c immunity prevents suit for damage from flooding caused by the negligent construction and maintenance of irrigation canals that are part of a flood control project. *See East Columbia Basin*, 105 F.3d at 520.

Despite our decision to affirm, we recognize the harsh result of this decision. The "not wholly unrelated" test applied

by this and other circuits reads broadly an already broadly-written grant of immunity. There does not appear to be any set of facts where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project. Indeed, counsel for the government admitted at oral argument that she could not think of any situation where § 702c would not confer immunity.

The Madera Canal disburses irrigation water throughout the San Joaquin Valley. The canal is not a flood control project and serves no flood control purpose. Despite having no flood control purpose, the Madera Canal enjoys § 702c flood control immunity solely because it is a branch of the Central Valley Project. Consequently, Central Green is left without a tort remedy for damages to its crops and farming equipment caused by the government's alleged negligence in constructing and maintaining the Madera Canal.

We recognize that had this case been instituted in the Fourth, Seventh or Tenth Circuit the government would probably not enjoy flood control immunity. *See Fryman*, 901 F.2d at 82 (requiring that flood control activities increase the probability of injury before conferring immunity); *Boyd*, 881 F.2d at 900 (requiring a nexus between flood control activity and the damage incurred); *Hayes*, 585 F.2d at 702-03. In denying certiorari to a case that could have resolved the conflict in circuit opinions on this issue, Justice Stevens suggested that this split in the circuits could be "resolved more effectively by Congress." *Hiersche v. United States*, 503 U.S. 923, 925 (1992). While agreeing with Justice Stevens, we believe this case might be an appropriate subject for Supreme Court review.

V. CONCLUSION

For the reasons stated above, we affirm the dismissal of this action for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN CO., Plaintiff, UNITED STATES OF AMERICA; MADERA IRRIG. DISTRICT, Defendant.	No. CV-F-96-5541 REC ORDER GRANTING UNITED STATES' MOTION FOR JUDGMENT ON PLEADINGS AND DISMISSING UNITED UNITED STATES FOR LACK OF SUBJECT MATTER JURISDICTION

On August 25, 1997, the court heard the United States' Motion for Judgment on Pleadings.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion for the reasons set forth herein.

Plaintiff, Central Green Company, has filed a First Amended Complaint for Damages for Inverse Condemnation; Nuisance; Trespass; and Negligence. The First Amended Complaint alleges in pertinent part that plaintiff owns real property located in Madera County that has been used continuously for the production of pistachios; that the United States planned, designed, constructed, and/or maintains the Madera Canal which is used to convey irrigation water to various lands in the San Joaquin Valley and which runs through plaintiff's property; that the Madera Canal was constructed or has been maintained in such a fashion that substantial amounts of water leak and have leaked from the Madera Canal causing substantial subsurface flooding of portions of plaintiff's property; that this subsurface flooding created an extremely shallow water table condition resulting in irreparable damage to portions of plaintiff's pistachio orchard, as well as increased farming and harvesting costs; that plaintiff has been told by defendants that the water seepage/leakage problem would be remedied; and that no remedial work or efforts have been taken. According to Exhibit B attached to the First Amended Complaint, the Madera Canal is part of the Friant Division, Central Valley Project. The parties do not dispute that one of the purposes of the Central Valley Project is flood control.

The United States has answered the First Amended Complaint and now moves for judgment on the pleadings on the ground of sovereign immunity.[1]

The Flood Control Act of 1928, 33 U.S.C. § 702c, provides in pertinent part:

> No liability of any kind shall attach to, or rest upon the United States for any damages from or by floods or flood waters at any place.

Involved in *United States v. James*, 478 U.S. 597 (1986) were accidents at flood control projects where recreational users of reservoirs were swept through water retaining structures when those structures were opened to release waters in order to control flooding. In construing Section 702c, the Supreme Court held that the terms "flood" and "flood waters" were not ambiguous in the context of accidents such as the ones at issue before the court:

> The Act concerns flood control projects designed to carry flood waters. It is thus clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood

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[1] The United States also moved to dismiss the claim for inverse condemnation alleged in the First Amended Complaint on the ground that this claim must be brought in the Court of Federal Claims. Plaintiff concedes this issue and agrees to a dismissal without prejudice as against the United States so that the claim for inverse condemnation can be filed in the Court of Federal Claims.

control, as well as waters that such projects cannot control.

Id. at 605. In so construing Section 702c, the Supreme Court rejected an argument that the legislative history justified a departure from the "plain meaning" rule of statutory construction, commenting that the legislative history reinforces the plain language of the immunity statute:

> The Flood Control Act enacted 'a comprehensive ten-year program for the entire [Mississippi River] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds.' ... The Act was the Nation's response to the disastrous flood in the Mississippi River Valley in 1927. That flood resulted in the loss of nearly 200 lives and more than $200 million in property damage; almost 700,000 people were left homeless ... The flood control system in the Mississippi River Valley in response to this catastrophe was the largest public works project undertaken up to that time in the United States.

It is not surprising, in the light of the devastation wrought by the 1927 flood and the magnitude of Congress' undertaking, that the legislative history of § 702c shows a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various projects. Numerous statements concerning the immunity provision confirm that it was intended to reaffirm sovereign immunity in such a dangerous and extensive project. The Chairman of the House Rules Committee, in opening the discussion on the rule governing debate on the 1928 Act, stated:

'I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people -

and I assume it is a national responsibility - I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years.' ....

A number of other Congressmen unequivocally stated that the United States should not be liable for any expenses other than the direct cost of constructing the project ....

These statements show that the sweeping language of § 702c was no drafting inadvertence ... Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control. As the Court of Appeals for the Eighth Circuit explained three decades ago .... § 702c's language 'safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language.' ... The equally broad and emphatic language in the legislative history shows that Congress understood what it was saying.

Id. at 606-608.

Plaintiff argues that the United States in not entitled to the immunity granted by Section 702c because the seepage/leaking of waters from the Madera Canal at issue in this action are not waters carried through a federal flood control project "for the purposes of or related to flood control" but, rather, were waters being carried in the Madera Canal for irrigation purposes.

In *State of Washington v. East Columbia Basin Irr. Dist.*, 105 F.3d 517 (9th Cir. 1997), *petition for cert. filed*, 66 USLW 3017 (June 26, 1997), the Ninth Circuit affirmed the district court's dismissal on the basis of sovereign immunity of a suit brought by the State of Washington against the East

Columbia Basin Irrigation District. The District managed the East Low Canal, a canal constructed by the United States as part of the Columbia Basin Project. The Project's combined purposes are generating energy, irrigation of agricultural lands, and facilitation of flood control by regulating the amount of water released from the Grand Coulee Dam. In 1992, one of the retaining walls of the East Low Canal burst, causing flooding and damage. The Ninth Circuit set forth the standard for sovereign immunity:

> This circuit interprets 702c to immunize the government so long as the damage sustained is 'not wholly unrelated' to a project with flood control as one of its purposes ... Some circuits have found this standard too broad ... but it is unquestionably the law of this circuit and, contrary to the District's argument, has never been disapproved by the Supreme Court.
>
> Section 702c immunity therefore applies as long as plaintiff's damages: (1) are caused by a flood or flood waters (2) from a federal project with flood control as one of its purposes and (3) are 'not wholly unrelated' to the operation of the project.

In determining whether the water was "flood or flood waters", the Ninth Circuit stated:

> 'It is clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as waters that such projects cannot control.' [*United States v. James*, 478 U.S. 597, 605 (1986)]; *see also Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995)('Even assuming the water was released "solely for" or "only for" irrigation and other purposes, it was water contained within a multi-purpose federal flood control project, and *James* clearly held that all

> water in a federal flood control project is considered "flood water" if it is part of the project.').
>
> Under this broad definition, the waters that spilled from the East Low Canal were 'flood waters.' That they might not have been considered flood waters under state law is irrelevant.

Id. at 519. The Ninth Circuit then discussed whether the Columbia Basin Project had as one of its purposes flood control. *Id.* at 519-520. The Ninth Circuit then considered whether the damage was "not wholly unrelated" to the Project:

> The project has flood control as one of its purposes, and the events giving rise to the action were not wholly unrelated to the project. That ends our inquiry. We need not determine whether flood control efforts contributed to the flood. See *Morici*, 681 F.2d at 648 (holding that 'the relationship between the flooding and a project Congressionally authorized for flood control ... is the controlling factor'); *Aetna*, 628 F.2d at 1204 (refusing to venture 'into the morass of "contributing causes," "superseding causes," and "intervening causes"') (quoting *Lunsford v. United States*, 570 F.2d 221, 228 n.13 (8th Cir. 1977).

Id. at 520.

Plaintiff argues that *East Columbia Basin* does not control the resolution of this issue. Plaintiff contends that both *East Columbia Basin* and *Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128 (11th Cir. 1995), cited with approval in *East Columbia Basin*, ignore the holding in *James* and, therefore, must be disregarded. Specifically, with respect to *East Columbia Basin*, plaintiff argues that its holding ignores the requirement set forth in *James* that the waters in the flood control project have been carried "for purposes of or related to flood control" and the conclusion in *McCarthy v. United States*, 850 F.2d 558, 561 (9th Cir. 1988):

> Given the definition of 'floodwaters' and 'damage' articulated in *James*, as well as standards we have set out in *pre-James* cases for determining the scope of § 702c immunity, we conclude that the immunity provision applies in this case. First, *James* made clear the term 'floodwater' is to apply to 'all waters contained in ... a federal flood control project for purposes of or related to flood control ... ' ... This definition of floodwater suggests that the term includes both 'waters that are out of control' and 'water at a flood control project' ... Thus, insofar as the waters of Lewisville Lake are clearly 'contained in' a federal flood control project and further, where the water level of the Lake is monitored on a daily basis and discharged when necessary, the waters herein satisfy the *James* definition of 'floodwater', and accordingly, fall within the meaning of the statute.

Plaintiff relies on this language from *McCarthy* in contending that the Ninth Circuit in *East Columbia Basin* did not determine whether the waters in the East Low Canal were being carried "for the purposes of or related to flood control" in concluding that the waters were "floodwaters". Plaintiff argues that, unless this determination is made, any water that happens to be carried in a flood control project is subject to Section 702c immunity irrespective of the purpose for which it is being carried. Plaintiff argues that such a conclusion contravenes the Supreme Court's statement in *James*.

Involved in *Reese* was a wrongful death action filed for the drowning death which occurred while the decedent was fishing in Lake Okeechobee after the Army Corps of Engineers opened a water control device to allow waters to flow downstream. The plaintiff argued that Section 702c did not apply to provide immunity because the water which caused the drowning was released by the United States for irrigational, agricultural and environmental purposes and not exclusively for flood control purposes. The Eleventh Circuit affirmed the district court's conclusion that the United States

was entitled to sovereign immunity, rejecting an argument that *James* was distinguishable because the Supreme Court found in *James* that the water involved was discharged to control flooding, while the water at issue in *Reese* was also used for irrigation and other purposes:

> Even assuming the water was released 'solely for' or 'only for' irrigation and other purposes, it was water contained within a multi-purpose federal flood control project, and *James* clearly held that all water in a federal flood control project is-considered 'flood water' if it is part of the project ... The periodic release of water is fundamental to the operation of a flood control project.

59 F.3d at 1130.

Plaintiff contends that *Reese* is incorrectly analyzed because it does not discuss whether the water in the lake was "for purposes of or related to flood control".

It is clear from plaintiff's brief that plaintiff's primary reliance is upon Judge Wanger's decision in *Sumner Peck Ranch. Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 744-745 (E.D.Cal. 1993):[2]

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[2] It is noted that *Sumner Pack Ranch* has been criticized by Judge Levi in *United States v. Iron Mountain Mines. Inc.*, 881 F.Supp. 1432, 1440 n.10 (E.D.Cal. 1995):

> RP relies on *Sumner Peck Ranch* ... to argue that the immunity only attaches if the particular waters causing damage 'are contained or carried through the project for "purposes of or related to flood control."' ... RP is correct that *Sumner Peck* appears to add as an additional requirement for immunity that the purpose of the water's conveyance be flood control. This additional requirement is not supported by Ninth Circuit case law. Although there may be some question how broadly to read *James*, in the Ninth Circuit, as discussed in text, it suffices for the immunity that the project is a flood control project and that the damage is related to the use

The first prong requires a determination that the water at issue can be termed 'floodwater' as used in § 702c ... The Supreme Court held in *James* that 'It is thus clear from § 702c's plain language that the terms "flood" and "floodwater" apply to all waters contained in or carried through a flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.' ....

The definition of 'floodwater' in *James* requires a two-part analysis: 1) is the water contained or carried through a federal flood control project; and 2) is it contained or carried through the project for 'purposes of or related to flood control'? In *McCarthy*, the Ninth Circuit found:

[I]nsofar as the waters of Lewisville Lake are clearly 'contained in' a federal flood control project and *further, where the water level of the Lake is monitored on a daily basis and discharged when necessary,* the waters herein satisfy the *James* definition of 'floodwater,' and accordingly, fall within the meaning of the statute.

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of the project. *McCarthy v. United States*, 850 F.2d 558, 562 (9th Cir. 1988); *Morici Corp. v. United States*, 681 F.2d 645, 647 (9th Cir. 1982). By adding an additional requirement for immunity *Sumner Peck* follows more nearly the rule adopted in the Fourth Circuit in *Haves v. United States*, 558 F.2d 701 (4th Cir. 1978). However, *Hayes* has been expressly rejected in both *McCarthy* and *Morici*. As the court noted in *Morici*, 'it is very difficult, if not impossible, as a practical matter to segregate particular ... water releases into precise categories of purpose.' *Morici*, 681 F.2d at 648 (quoting *Sanborn v. United States*, 453 F.Supp. 651, 659 (E.D.Cal. 1977)[)].

> ... As outlined above, the CVP can be considered a flood control project. Yet Federal Defendants have presented no evidence that the irrigation water supplied to Westlands was carried through the CVP for 'purposes of or related to flood control.' The presence of water or its conveyance through the CVP alone is not enough. If the sole purpose of the water's conveyance is irrigation, the water is not 'floodwater' and the immunity would not apply.

Plaintiff further argues that because the Ninth Circuit did not cite *Sumner Peck Ranch* in *East Columbia Basin*, this court should disregard *East Columbia Basin*.

This argument is without merit. *Sumner Peck Ranch* is not controlling on the Ninth Circuit or on this court. The court has no way of knowing why the Ninth Circuit did not address *Sumner Peck Ranch*, but it could well be that it did not because that case is still pending before Judge Wanger and has not yet been taken up on appeal.

Plaintiff's argument that the court should disregard very clear Ninth Circuit authority is misplaced, especially given the strong statements made by the Ninth Circuit in *East Columbia Basin*. Plaintiff further argues that it would be against public policy to provide immunity to the United States under Section 702c where damage is caused by waters released from a flood control project for irrigation purposes as opposed to flood control purposes. In this regard, plaintiff refers to the discussion of the legislative history in *James* quoted above and asserts that "a plain reading of the statute, congressional remarks and common sense dictates that this immunity does not apply to any and (all) damages claims caused by water passing through those projects and unrelated to the underlying purpose of flood control."

Plaintiff's argument is unpersuasive. The legislative history quoted above is very clear that the scope of the immunity is very broad. Plaintiff has cited nothing that allows the un-

dermining of the scope of that immunity when a multi-purpose project is involved.

ACCORDINGLY, IT IS ORDERED that the United States' Motion for Judgment on Pleadings is granted.

IT IS FURTHER ORDERED that the United States is dismissed from this action for lack of subject matter jurisdiction.

Dated: September 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTRAL GREEN COMPANY, a California Limited Partnership,	)	No. 97-17321
Plaintiff-Appellant	)	D.C. No. CV-96-05541-REC/SMS
v.	)	ORDER
UNITED STATES OF AMERICA; MADERA IRRIGATION DIST.,	)	
Defendants-Appellees.	)	

Before HUG, Chief Judge, B. FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Hug and Trott voted to deny the petition for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.